Cautionary notes on the shared care of children in conflicted parental separation

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ABSTRACT
The Family Law Amendment (Shared Parental Responsibility) Act 2006 has brought into sharp focus the issue of shared physical care of children, post separation. In this paper, we explore new data suggesting accumulative risks for children whose care is divided between parents who lack the core relational infrastructure to support a healthy environment for shared care. Developmental background is provided, giving context to the complex dynamics at play, particularly for young children who experience divided care in a hostile climate. A discussion of the amendments shows that, rather than endorsing an assumption of shared care, the legislation supports and indeed requires professionals to engage in active consideration of the child’s ‘best interests’ in each case. The paper outlines a tighter ‘safety net’ of considerations through which the ‘best interests’ question might be filtered. Implications for supporting separated parents to develop and maintain adequate foundations for shared care are discussed.

Key words: children; infants; divorce; shared parenting; family law; conflict; legislation

The shared physical care of children following separation has long been a complex issue and is again in the spotlight following the passing of the Family Law Amendment (Shared Parental Responsibility) Act 2006. In this paper, we introduce new Australian data on the patterns of shared care, parental conflict and the emotional wellbeing of children. We suggest that these patterns provide food for thought about the pluses and minuses of shared care arrangements in circumstances of continuing conflict in which parents are unable or unwilling to protect their children from experiencing that conflict. In the context of the current legal and perhaps social support in Australia for greater shared care, these findings sound a cautionary note. While these new data relate to children over four years of age, we also present a brief overview of psychological

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1. This paper is a revised and expanded version of an article originally printed in the Australian Family Lawyer 20: 3–16, January 2008.
2. Shared care throughout this paper is defined as 35%-50% of overnight time with each parent.
aspects of shared care for young children and infants.

We hope that the following discussion will reinforce how important it is for all dispute resolution practitioners, lawyers and others to evaluate the likely developmental consequences of shared care arrangements in each individual case. Predicting outcomes of care arrangements will never be an easy task, but professionals may be assisted by maintaining a close regard for emerging social science findings, including the factors outlined here, and by accurate interpretation of the new legislative guidelines as they try to assist conflicted parents towards developmentally sound post-separation care arrangements, whether agreed or adjudicated.

We begin from the position that, in general, children benefit greatly if they maintain good quality relationships with both parents following separation. However, in this article we are not mainly concerned with the many separating parents who can focus on their children’s interests and who, with or without external assistance, manage to sort out parenting arrangements in ways that keep any initial or ongoing conflict away from the children. We are mainly concerned with the interests of children in families characterised by persisting, poorly contained conflict between parents (see Hetherington & Kelly 2002; Johnston, Kline & Tschann 1989).

In a review of care and contact patterns across a representative cross-section of the Australian population, Smyth (2004) found that, at that time, shared care was ‘relatively rare’. It proved to be a viable arrangement for a small and distinct group of families, who self-selected into shared care arrangements and who had the following relational and structural profile:

- geographical proximity;
- the ability of parents to get along sufficiently well to develop a business-like working relationship;
- child-focused arrangements (with children kept ‘out of the middle’, and with children’s activities forming an integral part of the way in which the parenting schedule is developed);
- a commitment by everyone to make shared care work;
- family-friendly work practices for both mothers and fathers;
- financial comfort (particularly for women); and
- shared confidence that the father is a competent parent.

Many separating parents who require Court or formal dispute resolution services to determine their contact and care arrangements unfortunately do not share these characteristics. As a result of the introduction of the Family Law Amendment (Shared Parental Responsibility Act) 2006, it has arguably become even more important for professionals to identify the structural and relational arrangements proposed by a separating couple, and to consider carefully the extent to which these arrangements are likely to support each child’s developmental needs. We argue that this assessment is especially important whenever shared arrangements as defined above are being considered by couples with histories of entrenched dispute. This does not amount to an argument either for or against shared care arrangements. Instead, we encourage the maximal and timely support of parents by all family law professionals, to assist them to develop and maintain effective and child-centred post separation parenting environments. This necessarily involves the prior step of giving informed and careful consideration to the question of whether shared care at this point in time provides a desirable and viable developmental pathway for each child in the circumstances of each case.

It is beyond the scope of this paper to summarise the literature on shared care as it applies to the general population, but the reader is referred to recent Australian papers on the topic (Altobelli 2005; Smyth 2004; Smyth & Chisholm 2006; Smyth et al 2008). Literature that has specifically addressed the dynamics of shared care in the con-
text of protracted and/or serious levels of parental conflict (Johnston 1995; Johnston, Kline & Tschann 1989; Maccoby & Mnookin 1992; McIntosh, 2003) supports the need for careful consideration of the impact upon children of acrimonious co-parenting arrangements.

This literature highlights the complex dynamics at play for children who are exposed to persistent conflict between their parents. This includes tension ridden change-overs between the two houses, exposure to expressed acrimony, ongoing denigration of one parent by another, and insidious embroilment of the children in supporting the separate views of each parent, upon whom they continue to depend (Johnston & Roseby 1997). In such climates, in order to sustain a relationship with both parents, many children develop conditional, high maintenance loyalties to each parent, requiring the use of considerable developmental energy (Johnston & Roseby 1997). Several studies (Buchanan, Maccoby & Dornbusch 1996; Johnston et al 1989; McIntosh & Long 2006) suggested that the developmental benefits of spending time with a parent may be diminished in circumstances of high conflict when parental attunement to the child is compromised and a spill-over of negative affect occurs from parent to child. A key protective buffer shown to diminish the impact of conflict on children is the ability of parents to encapsulate their conflict and refrain from expressing their anger through their children, denigrating the other parent to the child, or using verbal or physical aggression in front of the child (Buchanan et al, op cit). Other buffers involve the child having a responsive, warm relationship with at least one parent and a supportive relationship with a sibling (Harrist & Ainslie 1998; Kelly 2005; Kerig 2001).

While it has been known for some time that the risks of conflict post separation are significant, less well known is the combined effect of conflict within shared care arrangements. Interestingly, both studies under discussion in this paper found higher rates of shared care among parents who had been involved in substantial or intense legal conflict compared to rates found in the general population of separating parents (27% mediation sample, 46% Court sample, 9.5% general population, as reported in Smyth et al (2008). This raises a number of questions:

- Is conflict exacerbated through the frequent decisions and communications involved in shared care?
- Does shared care simply bring more opportunity for conflict?
- Does pre-existing conflict fuel desire for parity of care at all costs?
- Is shared care employed as a solution by courts, mediators and conciliators to appease warring parties?

The present paper explores these themes as far as possible through data available from two Australian studies by McIntosh and colleagues, involving conflicted parents in dispute over care and contact. We outline specific areas of caution suggested by the data and identify factors that legal and family dispute resolution practitioners may consider, as they advise about shared care arrangements. We also review the Family Law Act amendments of 2006, and suggest that, while the present legal framework certainly emphasises the importance of parental involvement and requires decision-makers to give careful consideration to the benefits that children may have from co-operative parenting, it should not be understood as a strait-jacket that requires equal or near-equal shared parenting in all cases except those characterised by violence and similar problems.

**Findings from two Australian Studies**

The two recent studies discussed in the following paragraphs explored outcomes from dispute resolution interventions in Family Court and community settings for parents experiencing significant conflict over post-separation parenting agreements. The interventions were specifically...
designed to assist the management of parental conflict and to support higher levels of cooperation in post-separation parenting. Each study tracked family functioning prior to intervention and after settlement of the dispute, and considered associations between children’s wellbeing and parental acrimony, alliance or cooperation, and living arrangements.

Study 1: Disputing parents and their children: A mediation sample

The ‘Children Beyond Dispute’ research program is a longitudinal study, funded by the Australian Government Attorney General’s Department, and directed by McIntosh. The study is now in its fourth year. The findings reported here are from the first three phases of this project, where outcomes were compared for two groups of separated parents, who experienced one of two different forms of brief therapeutic mediation for entrenched parenting disputes. The study and its background are described in detail elsewhere (McIntosh & Long 2006), as are the interventions themselves (McIntosh 2007; Moloney & McIntosh 2004).

Among other things, the study explored impacts of the interventions on parental conflict, acrimony (psychologically held hostility), and parental alliance (parental cooperation and regard), and the emotional wellbeing of children. Data were collected from parents and children prior to their mediation, three months after, and again one year after. One hundred and eighty-three families were involved in this phase of the study, with parent report data collected on over 300 children. In this paper, we focus on data relating to shared care and to school-age children’s mental health, 1 year after the dispute was resolved.

Sixteen percent of parents arrived at mediation already in established shared care arrangements. Each of those families maintained that shared arrangement over the course of the year. Twenty-seven percent of this sample completed mediation with a new agreement for shared care of their children; however, three-quarters of those arrangements had reverted to less than 35:65% division by the end of the year. The most stable arrangements occurred in families who had never entered a shared arrangement, and maintained less than 35% shared care throughout the year. Of interest to those familiar with the two interventions involved, children in the Child Focused intervention were more likely to experience change to the pattern of their care over the course of the year, with 46% experiencing changing arrangements, compared to 24% of Child Inclusive cases (see McIntosh 2007 for details of the interventions).

The first author explored this sample of families further for differences between shared care and non-shared care parents’ perceptions of their conflict management and cooperation over the year following mediation. Fathers reported significantly better satisfaction with the mediation when the agreement reached was for shared care. However, the fathers in shared care arrangements at the end of the year (n = 25) reported consistently higher frequencies of minor conflict, serious verbal conflict and major conflict with their former wife throughout that year.3 Mothers in shared care arrangements (n = 29) did not report more conflict than other mothers; however, they were significantly more likely to feel at the end of the year that ‘my former partner does not believe I am a good parent’.4 At this broad level of analysis, shared care in this sample was not associated with reduction in conflict between parents over the course of 1 year, particularly from the perspective of fathers. What impact might this all have on children’s wellbeing? These answers are as yet unknown, but our preliminary analyses have explored factors associated with children’s poor mental health, one year after mediation.

Data on 181 school-aged children from the

4. Father does not believe mother is a good parent: $F = 1.0, t = 2.165, df = 116, P = 0.032$ (2-tailed).
above study were explored 12 months following mediation, including mother, father and child measures across the year. Children's mental health was measured with the Strengths and Difficulties Questionnaire (SDQ), parent report using the full scale score from the identified resident parent (Goodman 1997). This 20-item scale distinguishes children with normal, commonly occurring levels of anxiety from those who are in what is called the ‘clinical range’. The clinical range can be thought of as a concerning level of emotional distress, shown in anxiety, sadness, clinginess, psycho-somatic and anti-social symptoms, at a level that warrants professional intervention (ie counselling or child psychiatry services).

In keeping with large scale studies (Sawyer et al 2000), 21% of children in this mediation sample had a higher than average rate of clinical anxiety compared to 14% of non-divorced children in the Australian population. Multiple variables were systematically examined through regression modelling to see what core factors or combination of factors were most highly associated with children’s poor mental health outcomes one year after mediation (McIntosh & Long 2006; McIntosh, Wells et al 2008). These analyses identified six core variables:
1. Fathers had low levels of formal education.
2. There was high, ongoing inter-parental conflict.
3. Children’s overnight care was substantially shared.
4. Mother–child relationship was poor, as reported by mother and child.
5. There was high acrimony (psychological hostility) between parents.
6. The child in question was under ten years old.

The first two variables independently predicted poor outcomes. Variables 3 to 6 added significantly to the likelihood of poor outcomes when they co-occurred with any of the other variables. Analyses also indicated that fathers and children benefited from a shared residence arrangement most when this occurred in an environment of low acrimony and cooperation with the child’s other parent. Older children (over ten years) in shared care who were not caught in high conflict dynamics did not show evidence of poor mental health outcomes, and generally showed a greater capacity to cope with existing parental tensions.5

These early data give much food for reflection and some for concern. The study is ongoing, but to date has identified an important group of children whose wellbeing was significantly challenged by their parents’ immaturities and combined inabilities to sustain supportive relationships. In this climate, shared care arrangements compounded the risks of poor outcomes. What might the picture be for children whose parents require court interventions to resolve parenting arrangements? The following study dealt with a sample from that population.

**Study 2: High conflict parents and their children: A Family Court sample**

This second study examined outcomes for 77 parents and 111 children who had attended the Child Responsive Program (CRP) Pilot in the Family Court of Australia (McIntosh & Long 2007; McIntosh, Bryant & Murray 2008). This study involved comprehensive interviews with parents, prior to and four months after litigated settlement of their dispute over the care of their children. The interviews explored conflict, cooperation, relationships and child wellbeing, again using the Strengths and Difficulties Questionnaire (Goodman 1997), parent report, emotional symptoms sub-scale. Data for all children aged four years and over were obtained through this measure for domains of anxiety, tearfulness, fearfulness, psychosomatic symptoms and separation anxiety.

5. These data will be elaborated upon in a forthcoming follow up study of this sample, four years post dispute resolution.
Four months after settlement, 28% of these 111 children had mental health scores in the clinical range, indicating a high degree of emotional distress. Multiple regression modelling was used, exploring all variables to see which combination of factors best accounted for children’s poor emotional outcomes. The following five variables were most highly associated with children’s poor mental health outcomes in this Family Court sample:

1. The child was unhappy with their living and care arrangements.
2. The resident parent’s relationship with the child had deteriorated over the past four months.
3. The child lived in substantially shared care.
4. One parent held concerns about the child’s safety with the other parent.
5. The parents remained in high conflict.

The first three variables independently predicted poor outcomes. Variables 4 and 5 added significantly to the likelihood of poor outcomes when they co-occurred with any of the other factors. The emotional climate in which these Family Court children shared their lives between their parents was further illustrated by the following findings:

- Importantly – and in contrast to the relatively low rates of shared time identified in general population samples (eg see Smyth et al 2008) – 28% percent of the children studied here entered Court, and 46% left Court, in a shared care arrangement.
- In 73% of the shared care cases, at least one parent reported ‘almost never’ co-operating with each other, four months post Court.
- In 39% of shared care cases, a parent reported ‘never’ being able to protect their children from their conflict.
- In four of the shared care cases in this study, parents reported ‘never’ having contact of any kind with each other. The children in each of these families were responsible for conveying day-to-day messages between their parents, involving them directly in potentially unpleasant communications about them.

- Seventy percent of these orders were made by consent, either in the CRP or out of Court settlement. Thirty percent were judicially determined.

The data from this second study are concerning, because they suggest that a significant proportion of these children emerged from Family Court proceedings with substantially shared care arrangements that occurred in an atmosphere that placed psychological strain on the child.

To sum up, the two studies have limitations, notably the relatively small samples and the associated possibilities of sampling error. On the other hand, they have strengths, including their ‘repeated measures’ designs (comparing each parent and each child’s outcomes against their own baseline), which provide statistical power in smaller sample sizes, and obtaining data from multiple members of the same family. Substantial qualitative interview information also verified the core quantitative findings. We also note that strong correlations were found between mothers’ and fathers’ mental health ratings of their children, and between parents’ ratings and children’s own subjective wellbeing scores. All of these factors contribute to the confidence we place in these findings. Further, as Smyth (2004: 118) has identified: ‘There is so little empirical data on shared parenting that to disregard small pockets of data runs the risk of leaving our knowledge of joint parenting poorly informed.’

These two studies support the need for larger scale enquiry into the potential links between living arrangements, parenting maturity and availability, conflict and children’s psychological health.

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6. Analyses controlled for whether the parent was the applicant or respondent. Technical information is available in McIntosh and Long (2007).
PSYCHOLOGY OF SHARED CARE FOR YOUNG CHILDREN

The findings we have presented relate to children aged over four years. In relation to young children, it is important for practitioners to have regard for what we know about psychological development in the pre-school years. The nature of the strain imposed for very young children and infants by developmentally inappropriate living arrangements is considered in this section, taking us to the territory of attachment development. The vast literature that underpins attachment theory cannot be summarised here, but we offer some of the core findings as context for understanding the outcomes of the above studies, and for informing deliberations about shared care for young children and infants.

The psychological issues involved in the division of children’s care between two parents, two homes and two families are complex. Selected summaries of related literature are available (Altobelli 2005; Smyth et al 2008) but the field awaits definitive longitudinal research and meta-analyses in this critical area.

It can, however, safely be said that the healthy emotional development of children depends upon their early experience of a continuous, emotionally available care-giving relationship, through which they are able to form an organised attachment and to develop their human capacities for thought and relationships (McIntosh 2006). This core finding from attachment research can readily be misunderstood when legal decisions are concerned. For example, the infant’s need for a primary attachment figure can be overlooked because of oversimplified understandings of the research evidence (eg when findings are taken to mean that the infant can only have one caregiving relationship with one adult), or where research findings are misapplied to support the legal preference of one parent over another. Clearly a young child can form more than one attachment relationship. Further, a child in any family situation will develop a qualitatively different attachment to each parent: for example, a secure attachment to the father and an insecure attachment to the mother, by virtue of the essential differences in care-giving styles of each parent, which reflect the parent’s own attachment history (Fonaghy & Target 2005). The important point is this: attachment security is not transferred by the child from one parent to another when they move between their care. A child who has a secure attachment to one parent will not necessarily have an equally good attachment to the second parent. If increasing the child’s time with the second parent means reducing the child’s time with the first, the change can in some circumstances compromise the security of attachment with the first parent, with all of its attendant developmental ramifications (Siegel 1999).

Part of the developmental conundrum posed for young children of divorce is this: their attachment formation is likely to be poorly affected (or to become ‘disorganised’ in theoretical terms) when that infant does not have a continuous experience of reliable care with one or other parent. Shared care arrangements that involve frequent moves from one parent to another can, inadvertently, bring about this experience. Typical patterns of care for infants involve frequent transitions to avoid lengthy absence from either parent (Kelly & Lamb 2000), but in this way, care with either parent risks becoming a discontinuous experience, and brings about particular difficulties when the primary attachment relationship is disrupted. The potential developmental difficulties for infants are significant, particularly for those with parents who remain acrimonious and struggle to facilitate a smooth transition for the infant (Solomon & George 1999).

For older children, and particularly adolescents, the primacy of attachment diminishes with advancing years, enabling the older child to tolerate longer periods of time away from a caregiver, and to consolidate and make good use of bonds of dependence with others. Yet when children of any age make frequent transitions between warring parents who are unable to conceal their feelings in the presence of the child, children then...
begin to use considerable energy to ensure their own comfort and emotional safety in each environment, actively and constantly monitoring the ‘emotional weather’ they encounter in each parent’s home.

Through this developmental lens, it is relatively easy to see how, in the two studies presented here, the risks added up for children of conflict-ridden families who lived in shared care arrangements. Further, although the data in the two studies related to outcomes for children over four years of age, there are important developmental reasons, sketched above, to be cautious about the recommendation of shared care for children under four. We hope to have shown in this section why caution becomes more urgent in the case of the infant and the young child of high conflict divorce.

Against this background, we now review the application of the new legislation on shared parenting to conflicted families, particularly the more extreme cases often presenting to the Family Court or the Federal Magistrates Court.

**Legislative Context**

This section considers the legislative context surrounding the reviewed findings, now that the amendments of 2006 are in place. We argue that there is nothing in those amendments or their background to prevent practitioners from taking new social science data into account in applying the law. In fact, there is a good deal to support practitioners in so doing. We first consider the paramount consideration principle, then the amendments relating to parental decision-making (‘parental responsibility’), then those relating to parenting arrangements, particularly the time children are to spend with parents. We also consider briefly the new provisions relating to process.

### ‘Paramount consideration’ principle

What we now call parenting law7 has long been governed by the principle that the child’s best interests must be treated as the paramount consideration. This principle was originally developed by court decisions in the nineteenth and early twentieth centuries, and then incorporated into legislation. Not only has it been retained in the Act, but its importance was repeatedly emphasised in the background papers to the amending Act of 2006 (Chisholm 2007). Section 60CA now provides:

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

### Parental responsibility severed from residence since 1996

The amendments of 1995 and 2006 resulted in the replacement of the term guardianship with parental responsibility, and a number of provisions designed to emphasise the importance of both parents being involved in cooperative parenting after separation. There are a number of components to this.

The first component was the severance of the link between residence and decision-making. Before 1996, a custody order did two things: it meant that the child was to live with the custodial parent, and also that the custodial parent alone had certain decision-making powers. The 1995 amendments changed this. The new ‘residence’ orders were different from the custody orders they replaced, in that when they provided only that the child should live with one parent (the ‘residence parent’), they gave that parent no particular advantage in decision-making. Unless the court deliberately ordered otherwise, both parents

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7. Before 1995, it was generally called ‘custody law’, and the usual orders were known as ‘custody’, ‘access’, and ‘guardianship’ orders. The language was changed by the 1995 amending Act: the court could make various ‘parenting orders’, namely residence orders, contact orders, and specific issues orders; and guardianship was replaced by ‘parental responsibility’. The 2006 amendments changed the language again, dropping the names of the parenting orders, and just saying that the court could make parenting orders dealing with various topics, notably with whom the child should live and with whom the child should spend time or communicate. ‘Parental responsibility’ was retained.
retained the equal decision-making power they had by virtue of having parental responsibility.\textsuperscript{8} This feature was retained in the 2006 amendments. They got rid of the legal labels ‘residence’ and ‘contact’, and revised the list of things that could be covered by parenting orders,\textsuperscript{9} but it remains the case that an order for a child to live with a person gives that person no additional decision-making power. The obvious intention is to encourage continued involvement by both parents in decision-making, even though the child might be living mainly with one parent, and even though one or both partners might have re-married.\textsuperscript{10}

**Shared parental responsibility and the amendments of 2006**

The 2006 amendments also introduced some new measures designed to reinforce cooperative parenting. The first was a presumption of equal shared parental responsibility. By s61DA(1), with certain qualifications, when making a parenting order, the court ‘must apply a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child’. There is an exception, namely cases where there are reasonable grounds to believe that a parent has engaged in child abuse or family violence.\textsuperscript{11} And in interim proceedings (where the evidence is often incomplete) the presumption applies ‘unless the court considers that it would not be in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child’.\textsuperscript{12} The presumption may be rebutted ‘by evidence that satisfies the court that it would not be in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child’.\textsuperscript{13}

The second new measure is an explicit statement that an order for shared parental responsibility creates obligations to share decision-making: s65DAC. The obligation is imposed on persons who, under a parenting order, are to share parental responsibility for a child, and relates only to decisions ‘about a major long-term issue in relation to the child’. The section says that the order ‘is taken to require the decision to be made jointly’ by the persons who have such parental responsibility\textsuperscript{14} – something that makes little sense when there is a difference of opinion between the parents. More sensibly, the section goes on to say that the order is taken to require them to consult with each other and make ‘a genuine effort to come to a joint decision’ about the issue.\textsuperscript{15} Failure to do this would be a breach of the order, potentially attracting penalties.\textsuperscript{16}

Strangely, perhaps, the legislation does not explicitly say that there is such an obligation to consult where there has been no such order. Although one might think from the emphasis the background papers gave to cooperative parenting, and perhaps from some of the language of s60B,\textsuperscript{17} that there would be such an obligation, careful attention to the words of the Act seems to indicate that there is no such obligation. The provision that ‘each parent has’ parental responsibility\textsuperscript{18} remains unamended, and the express

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\textsuperscript{8} Parental responsibility means ‘all the duties, powers, responsibilities and authority which, by law, parents have in relation to children’: s61B. In the absence of a court order to the contrary, each parent ‘has parental responsibility’: s61C.

\textsuperscript{9} Section 64B(2).

\textsuperscript{10} See s61C(2), providing that the parents’ parental responsibility ‘is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying’.

\textsuperscript{11} More precisely, ‘if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in: (a) abuse of the child or another child who, at the time, was a member of the parent’s family (or that other person’s family); or (b) family violence’: s61D(2).


\textsuperscript{13} Section 61D(4). 14. Section 65DAC(2). 15. Section 65DAC(3). 16. See generally Division 13A of Part VII.

\textsuperscript{14} ‘ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives’; (2)(c) ‘parents jointly share duties and responsibilities concerning the care, welfare and development of their children’; and (2)(d) ‘parents should agree about the future parenting of their children’.

\textsuperscript{15} Section 61D.
creation of the obligation in cases of court orders might be taken to imply that there is no such obligation where there is no court order. While it is clear that parental cooperation is encouraged by the Act, and that failure to cooperate might be taken into account against a parent in relation to parenting orders, it seems that there may be no enforceable legal obligation to consult except where there is an order for shared parental responsibility.

**Court’s obligations to consider the child spending equal time, or substantial and significant time, with each parent**

The Parliament’s answer to the question whether there should be a legal presumption in favour of children spending equal time with each parent was ‘No, but …’. The relevant provision is lengthy, but can be easily summarised. It applies in cases covered by the presumption in favour of equal shared parental responsibility: that is, roughly, in all cases except those involving such things as violence and abuse. It says, essentially, that in making a parenting order the court ‘must consider’ making orders that the child spend equal time, or if not equal then substantial and significant time, with each parent. ‘Substantial and significant time’ is defined to mean, essentially, weekdays and weekends and holidays, times that allow the parent to be involved in the child’s daily routine as well as occasions and events that are of particular significance to the child or the parent. This is an important provision, but falls short of establishing a presumption that it is better for children to spend equal time, or substantial and significant time, with each parent. One obvious intention was to challenge any assumption that it is normally satisfactory for children to see one parent only for limited purposes, such as being entertained at weekends, which would make it difficult for that parent to be fully involved as a parent, and difficult for the child to maintain or consolidate a secure attachment with a parent whose behaviour is oriented only to ‘visiting’ rather than ‘care-giving’.

The Full Court has neatly summarised the gist of the provisions in the following carefully-worded sentence:

In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children’s lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.

**Obligations on advisers**

Another measure that needs consideration is the detailed prescription about the obligations of advisers (legal practitioners, family counsellors and family dispute resolution practitioners). Section 63DA first requires advisers to inform the clients that they could consider a parenting plan, and where they could get further assistance in doing so. It then says that if the adviser gives them advice in connection with making a parenting plan, the adviser must give them specified

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19. This is partly because expressly including something at one place and not at another may suggest that it was deliberately excluded at the second place: see the discussion in DC Pearce and RS Geddes, Statutory Interpretation in Australia (6th ed 2006), at paragraph [4.28].
20. See s60CC(4) (court to consider the extent to which each parent has taken the opportunity to participate in making decisions about major long-term issues in relation to the child, and has facilitated the other parent in doing so).
21. Section 65DAA.
22. The court must consider whether equal time would be in the child’s best interests; and whether it would be practicable; and, if it is, consider making an order for equal time: s65DAA(1). If not, then the court must consider the same issues in relation to ‘substantial and significant’ time: s65DAA(2).
24. Section 63DA(5).
25. Strangely, the requirements are not expressed to apply when the advice relates to consent orders as distinct from parenting plans.
The content of this generally follows the new guidelines relating to determining the child's best interests. Thus, in summary, the advisers must inform their clients:

- that they 'could consider' equal time, or substantial and significant time, if either is reasonably practicable and in the child's best interests;
- that the decisions should be made in the child's best interests;
- about the matters that can be covered by a parenting plan;
- that the parenting plan may override any prior parenting order;
- about the desirability of including in the plan provisions about methods of resolving future problems;
- about the availability of programs that help people who have difficulties in complying with parenting plans; and
- that s65DAB requires the court to consider any existing parenting plan when making parenting orders.

**New guidelines for determining the child’s best interests: s60B and s60CC**

The amendments of 2006 continued the pattern of increasingly elaborate legislative guidelines and exhortations, particularly in relation to the critical task of determining the best interests of the child. We present the most significant sections, which are s60B and s60CC.

Section 60B sets out the ‘objects’ of Part VII, and the ‘principles underlying it’:

(1) The objects of this Part are to ensure that the best interests of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that (except when it is or would be contrary to a child’s best interests):

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

Section 60CC(1) says that the court ‘must consider the matters’ in subsections (2) and (3). Subsection (2) says that ‘the primary considerations are’:

(a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
to, or exposed to, abuse, neglect or family violence.

Subsection (3) says that ‘additional considerations are …’ and then sets out a long list of matters, the last being the catch-all, ‘any other fact or circumstance that the court thinks is relevant’. Apart from a few modifications, they are the same considerations that were previously in the Act, and which, in turn, largely reflected the matters that courts had long taken into account. They include, for example:

(a) any views expressed by the child …
(b) the nature of the relationship of the child with … each of the child’s parents; and … other persons …
(c) the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
(d) the likely effect of any changes in the child’s circumstances …
(f) the capacity of [parents and others] to provide for the needs of the child …

The overall direction of these provisions is clear enough. The legislature has retained the principle that the child’s best interests must be regarded as the paramount consideration. However, in providing guidance to the courts on how to determine those best interests, it has strongly emphasised two aspects: the benefit to the child of a meaningful relationship with both parents, and protection from violence and abuse. These are the two ‘primary’ considerations in s60CC, and the first two of the objects of Part VII. The court also has to consider all the other matters relating to the best interests of the child – the ‘additional considerations’ in sub-section (3).

Although that much is evident, at the time of writing it is not entirely clear how these provisions will be interpreted. We do not quite know how the courts will determine whether a particular parent–child relationship is ‘meaningful’. Nor do we know the significance of the word ‘benefit’ paragraph (a). Does the provision mean that any ‘meaningful’ relationship with a parent is presumed to be of benefit to the child? Or is the word an invitation to the court to assess in each case whether there is in fact a benefit to the child, having regard to the ‘additional considerations’? Most obviously, we do not yet know how much weight they will give to the idea, introduced for the first time by the 2006 Act, that some considerations are ‘primary’ and others ‘additional’ (eg see Parkinson).31 However, these uncertainties relate mainly to the relative weight the courts should give to various factors. They do not in any way limit the categories of matters that need to be considered in determining the child’s best interests.

**Changes relating to process**

For the purpose of this article it is not necessary to deal in detail with the amendments of 2006 relating to the processes of family law. There are two main aspects of these provisions. The first is a provision making it mandatory, in most cases, for parties to attempt to resolve their differences before commencing proceedings (Section 60I) – the latest development in the long-standing policy of encouraging parties to settle parenting disputes.32 The second aspect was genuinely new: a set of principles and powers for the courts so that they can conduct children’s proceedings in a ‘less adversarial’ way (Harrison 2007).

Two features of these provisions are relevant here. The first is the new provision that for the purpose of the proceedings the court may desig-
nate a family consultant, whose task includes ‘helping people to better understand the effect of things on the child concerned’. The second is the legislative principle that ‘the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings’.

These provisions show that Parliament was concerned about impacts on children, and that it attached importance to expert advice about children and their needs. They reinforce our view that it is entirely consistent with the legislation to learn from and apply research findings about the developmental needs of children.

CONCLUSION

The previous section has shown that it is wrong to see the amendments of 2006 as creating a presumption in favour of equal of near-equal sharing of children, or indeed imposing any one-size-fits-all outcome on arrangements to be made for children following family separation. As we have seen, the new provisions:

- continue the principle that the child’s best interests must be regarded as the paramount consideration;
- require the courts, in determining the child’s best interests, to consider as ‘primary considerations’ the benefit to the child of having a meaningful relationship with both parents, and the need to protect the child from physical or psychological harm from abuse, neglect or family violence; and also to consider a long list of ‘additional considerations’;
- emphasise that both parents should normally share decision-making following separation, even where one or both re-partner or remarry, and regardless of whether the children live mainly with one parent;
- strongly encourage parents to cooperate in decision-making relating to the children, and create legal obligations to do so where the court has made an order for shared parental responsibility;
- where there is an order for equal shared parental responsibility, require the court to consider whether the child should spend equal time, or substantial and significant time, with each parent, except in cases of violence, or child abuse or neglect; and
- require advisers to have regard to these things.

For advisers and legal practitioners, as well as for decision-makers, it is important to take into account what social science can tell us about what will benefit children, particularly what constitutes a developmentally meaningful relationship with their parents (s60CC). The enhanced role of the family consultant in the new ‘less adversarial’ process is a strong indicator that social science is seen as important. The new guidelines, although more prescriptive than the old, still focus on the child’s best interests, and the new concepts are consistent with the use of social science.

Neither the general conditions for children’s healthy emotional development nor the specific new findings described above contradict the core principle underpinning the new legislation, namely that most children will benefit from having both parents actively and cooperatively involved in their lives after separation. The data reported here suggest, however, that a group of children are liable to slip through the safety net of considerations designed to ensure that children do in fact benefit from shared parenting. The findings sound a strong cautionary note about applying the new presumptions to cases characterised by ongoing high conflict between parents. We have shown how, in living between and within climates of ongoing dispute and emotional pre-occupation, the mental health ‘benefits’ of substantially shared care accrued by children are questionable.

33. Note to s69ZS. See also s11A.
34. Section 69ZN (it is the first of the five legislative principles).
35. Division 12A of Part VII, especially ss11A, 69ZS.
By implication, then, the ‘safety net’ of considerations through which we filter the ‘best interests’ questions attached to shared physical care needs to be more tightly woven. The task is to sensibly guide ourselves through the socio-legal and often highly emotive contexts that surround the issue, in order that developmentally appropriate decisions can be made in each case.

In summary, the research described above is presented by way of a cautionary tale with respect to post separation parenting arrangements that require children to move between parents where that exposes the children to high conflict between parents whose relationship with each other remains acrimonious and who have a low capacity to be attuned to the children's needs. The data suggest that in such cases substantial sharing of care after separation might increase the risk for children, and we therefore urge dispute resolution practitioners and decision-makers to consider this possibility. There is also reason to believe that this risk is likely to be greater with younger children.

Specifically, the research suggests that post separation parenting arrangements entail risks for children's healthy emotional development in families that have the following specific factors, especially in combination. Parent factors include: Low levels of maturity and insight; poor emotional availability to the child; ongoing, high levels of inter-parental conflict; ongoing significant psychological acrimony between parents; and child is seen to be at risk in the care of one parent. Child factors are: Under ten years of age; the child is not happy with a shared arrangement; and the child experiences a parent to be poorly available to them.

More research is required to tease out the mechanisms of risk as they apply to differing situations. Until then, the dilemma for the practitioner (as is often the case) is what to do until more definitive data come to hand. We again caution against a black and white interpretation of these data, for example, through denying parents the right to enter shared care arrangements when risk factors are present. Wisdom would instead suggest that where cautions do exist, parents be guided (and in appropriate cases ordered by the court) to engage in appropriate pathways or interventions that may over time enable them to develop the core relational pre-requisites that substantially shared care requires. The end result optimally would be the cessation of overt and obvious acrimony, and the achievement of, at least, ‘passive cooperation’ as Smyth (2004) advocates, with encapsulation of conflict and increased parental sensitivity to the experiences of the children involved.

In keeping with the findings of Johnston et al (1989), these Australian data suggest that shared physical care is an arrangement best determined by the capacity of parents to exercise maturity, to manage their conflict and to move beyond ego-centric decision-making in order to adequately embrace the changing developmental needs of their children. When considering ‘the benefit to the child of a meaningful relationship with both of the child’s parents’, considerable weight should be given to the need of the child for care and contact arrangements that protect them from parental dynamics otherwise likely to erode their developmental security. The bottom line may simply be this: it is not enough to mediate or adjudicate shared arrangements with conflicted parents without considering the structural and relational equipment necessary to support and safeguard children, so that they indeed benefit from the ongoing care of each parent.

We hope that this paper will contribute to social science and legal professionals’ awareness of conditions under which substantially shared care might strain rather than support a child. Furthermore, that it will encourage both professions to share the responsibility of enabling the appropriate sharing of a child’s care and development,
rather than the division of a child’s life between two hostile, preoccupied, ‘parent rights focused’ camps. Ultimately, we are asking professionals to ask themselves: Will a shared living arrangement in this parental context lead to an experience for the child of being richly shared or deeply divided?

Acknowledgement
This manuscript has been adapted from McIntosh and Chisholm (2008) Shared care and children’s best interests in conflicted separation: A cautionary tale from current research, Australian Family Lawyer 20: 3–16.

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